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No. 531

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IN THE

Supreme Court of the United States

October Term, 1967

MARGIT SIGRAY BESSENYEY,

Petitioner,

v

COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

ORRIN G. JUDD
Attorney for Petitioner
655 Madison Avenue
New York, N.Y. 10021
(212) 838-3700

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32 CASE PRESS INC., 421 HUDSON ST., N.Y.—ORegon 5 4540

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COMMISSIONER OF INTERNAL REVENUE

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Respondent's memorandum stretches the facts beyond anything in the record, in its assertion that petitioner "professed indifference to her losses" (p. 3). The portion of the opinion cited by respondent (p. 28-a) does not support the assertion, and is directly contrary to petitioner's sworn testimony that she expected to make a profit and would not continue if she never made a profit (Petn., pp. 10-11).

The extremity of this case may account for respondent's action. The Court of Appeals indicated quite clearly that it would regard the Tax Court's decision as erroneous, except for the restrictions which *Commissioner* v. *Duberstein*, 363 U.S. 278 (1960) was deemed to place on the scope of review.

Such an application of *Duberstein* is really "an example of an undue and unfortunate yielding of responsibility to juries and other triers of the facts", to quote a commentator

who is not noted as a partisan of taxpayers. (Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 Harv. L. Rev. 81, 90–1960).

The *Imbesi* case (361 F. 2d 643), cited by respondent (Memo., p. 4), represents a different approach to the problem from that of the Court below, for the Third Circuit Court of Appeals in the *Imbesi* case reversed a Tax Court determination, where the Tax Court disregarded positive testimony of a profit motive without explaining the reason for its finding.

The respondent's answer to the point concerning deductibility of farm losses is not responsive (Memo., p. 5). The question is not the taxpayer's choice of a particular method of computation, but the fact that the amount of losses is distorted by the special privilege given to agricultural taxpayers, of expensing items which other taxpayers must treat as capital costs.

The Tax Court, and the taxpayers whose affairs may come before that Court, are entitled to have the appellate courts set guidelines for deciding issues like the business character of an enterprise. This is an appropriate case for this Court to establish such guidelines, and to mark the limits on the freedom of a factfinder to be unpredictable.

CONCLUSION

The petition for certiorari should be granted.

New York, New York
September 28, 1967.

Respectfully submitted,

ORRIN G. JUDD,
Attorney for Petitioner.

HENRY B. HYDE,
EARLE K. MOORE,
RONALD DREIER,
Of Counsel.